

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EDWARD EARL COLD,

Defendant-Appellee.

UNPUBLISHED

June 17, 2004

No. 245961

Genesee Circuit Court

LC No. 01-009126-FH

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the sentence of two years, three months to thirty years imposed on defendant's plea-based conviction of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii). We vacate the sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, a conviction which at the time carried a mandatory sentence of not less than twenty nor more than thirty years in prison.¹ The trial court departed from the mandatory minimum term and sentenced defendant to two years, three months to thirty years in prison with credit for forty-three days, citing defendant's lack of a prior record, his history of steady employment, and his age, thirty-seven, as substantial and compelling reasons for departing below the minimum term.

At the time of sentencing, a trial court could depart from a mandatory minimum term if it found on the record that substantial and compelling reasons existed to do so. MCL 333.7401(4). To constitute a substantial and compelling reason for departing from a mandated sentence, a

¹ Effective March 1, 2003, MCL 333.7401 was amended to eliminate mandatory minimum terms. Sentences imposed under MCL 333.7401 are now subject to the statutory sentencing guidelines. The amended sentencing provisions apply to persons sentenced on and after March 1, 2003, *People v Thomas*, ___ Mich App ___; ___ NW2d ___ issued 2/3/04 (Docket No. 243817), slip op at 5, and thus are inapplicable in this case.

reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). Appropriate factors for consideration include: (1) mitigating circumstances surrounding the offense; (2) the defendant's prior record; (3) the defendant's age; (4) the defendant's work history; and (5) post-arrest events, such as the defendant's cooperation with law enforcement officials. *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000). We review the trial court's determination of the existence of a substantial and compelling reason for departure for clear error, the determination that the reason is objective and verifiable for error, and the determination that the reason constituted a substantial and compelling reason to depart from a mandated term for an abuse of discretion. *Fields, supra* at 77-78. A trial court must specifically articulate on the record its reasons for determining that considered factors constituted substantial and compelling reasons for departing from a mandated minimum term. *Daniel, supra* at 8-9.

We vacate defendant's sentence and remand for resentencing. The factors cited by the trial court as reasons for departing from the mandated minimum term, defendant's age, work history, and lack of a prior record, were objective and verifiable and appropriate for consideration. *Id.* at 7. However, the trial court failed to give the required explanation as to why these factors constituted substantial and compelling reasons for departing from the mandated minimum term. *Id.* at 8-9. Moreover, we find that the factors cited by the trial court cannot be said to irresistibly hold the attention of the court in this case. *Fields, supra* at 67. Defendant's age, thirty-seven, was not exceptional and did not support a downward departure from the mandated minimum term. Defendant was not a teenager or young adult who exercised poor judgment. Rather, the evidence supported the trial court's conclusion that defendant made a deliberate decision to traffic in narcotics. The trial court abused its discretion by holding that defendant's age constituted a substantial and compelling reason for departing from the mandated minimum term. *Id.* at 78. The remaining factors cited by the trial court were not exceptional and did not warrant downward departure from the mandated minimum term. This is especially true given that there were no mitigating circumstances surrounding the offense, and no evidence showing that defendant cooperated with law enforcement officials. *Daniel, supra*.

We vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray